Supreme Court, U.S.
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No. 99-2084

IN THE

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

SYED MOUZZAM ALI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I.

THE CALIFORNIA COURT OF APPEAL DECISION IN *ALI v. CITY OF LOS ANGELES* IS BASED ON THE SPECIFIC FACTS OF THE CASE APPLYING CALIFORNIA LAW.

The decision and opinion in *Ali v. City of Los Angeles* do not conflict with established federal takings law, which supports damages for temporary takings arising from certain misapplications of local regulations (*i.e. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)). Federal law was never a primary concern in the *Ali* Inverse Condemnation cause as it wove through the California courts. The major consideration in the California Ali appeal was the City's total disregard of the state Ellis Act.

Ali is a temporary takings case based primarily on state law. The Court found a temporary taking due to delay in processing a demolition permit because the City's position "was so unreasonable from a legal standpoint as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for an SRO hotel" (Petitioner's Appendix 13).

The reason underlying appellate affirmance of the decision that the City of Los Angeles' delay was unreasonable, implausible, and unexcused is that the City employed as an excuse for not immediately issuing a

demolition permit a local ordinance that never applied to Mr. Ali's property in the first place. The delay also operated as leverage to obtain low-income housing on a lot perceived by the City as appropriate for such housing. The application of the local ordinance when Ali applied for a demolition permit under the circumstances presented violated state law, the Ellis Act (California Government Code § 7060 *et al.*).

The Ellis Act, passed in March 1986 (3 years prior to Ali's application for a demolition permit), was not at all uncertain or unsettled in January 1989; it had already been interpreted by two published Second District Court of Appeal decisions (both published in September 1998 — some six months prior to Ali's application). Those two cases, *Javidzad v. City of Santa Monica*, 204 Cal.App.3d 524, 251 Cal.Rptr. 350 (1988); and *City of Santa Monica v. Yarmark*, 203 Cal.App.3d 153, 249 Cal.Rptr. 732 (1988), both held that the Ellis Act preempted city ordinances which prohibited demolition of residential rental buildings.

Thus under the Ellis Act, cities are required to allow owners to demolish their buildings and go out of the rental business. These decisions are so clear and unambiguous on this point, that the City clearly was unreasonable in ignoring Ellis and stonewalling the issuance of the demolition permit.

The California courts have agreed that in the *Ali* case the City of Los Angeles continued to violate the Ellis Act long after it knew or should have known of its violation. The City's conduct, as of January 1989, was plainly arbitrary in ignoring the law applicable to the Ali demolition request. Furthermore, as the trial court found, not only did the City ignore the Ellis law, but also ignored Ali's repeated notices

to the City and the City Attorney's office about the existence of the Ellis Act, *Javidzad* and *Yarmark*, and Ali's claims under the Act.

Thus it is immediately clear that the decision in *Ali v. City of Los Angeles* is based on California statutes, Los Angeles City ordinances, and interpretations by California courts of California law, with an acknowledgment of *First English*. Since state law predominates in this case, the state courts are best equipped to determine its issues. The state courts already have done so, and the well-considered and thoughtful opinion herein should stand.

II.

PETITIONER DID NOT ADEQUATELY PRESENT FEDERAL ISSUES IN THE CALIFORNIA APPEAL, AND THIS COURT THEREFORE DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257.

28 U.S.C. § 1257(a) sets out the jurisdiction of this Court as to state court judgments and requires either that the validity of a treaty or statute be challenged as contrary to federal law or that a federal title, right, privilege or immunity is specially set up or claimed. In addition, the issues for which certiorari is asked must have been rendered by the highest court in the state. The instant petition does not demonstrate any of these requirements.

Where the state court was silent regarding the issues for which certiorari is sought before the United States Supreme Court, it is assumed that the federal question was not properly presented in the state courts and certiorari is generally denied (*Adams v. Robertson*, 520 U.S. 83, 86-7, 137 L. Ed. 2d 203,

117 S. Ct. 1028 (1997); *Street v. State of New York*, 394 U.S. 576, 581, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969)). If it is not evident from the state court decision that the federal issue was raised in that Court, the United States Supreme Court usually attributes the decision to state law (*United States ex rel. Pascal v. Burke*, 90 F. Supp. 868, 871 (1950)). Further, the federal question presented must be a substantial one (*Reich v. City of Freeport*, 388 F. Supp. 953, 955 (1974), *aff.*, 527 F.2d 666 (1975)).

As shown by the opinion at Petitioner's Appendix 1-16, the California Court of Appeal did not decide a federal question, but primarily relied on California's Ellis Act and state court decisions interpreting it to affirm Judgment for Respondent Ali. The opinion's failure to cite federal law as a specific basis for its decision forces the conclusion that the case was indeed decided under state law and renders this Court without jurisdiction to grant certiorari. Any background discussion of federal law in the opinion does not constitute the "substantial" federal question necessary for Supreme Court review.

In its Petition for Review before the California Supreme Court, Petitioner City of Los Angeles articulated two issues regarding exhaustion of administrative remedies under local law and a third regarding ultra vires activity by local agencies (Petitioner's App. 56-7). Although issues such as these rely on United States Constitutional law in a very general way, they specifically were framed before the California Supreme Court to question whether Ali's activities exhausted California and local administrative remedies and whether the City had due authority under the requirements of the Municipal Code. Respondent submits that these issues do not sufficiently concern federal law to constitute federal questions.

In seeking rehearing before the California Court of Appeal, Petitioner based its Petition on grounds of factual conflict with the findings and a claim that the facts did not support the decision (Petitioner's App. 80). Thus the City's basis for seeking rehearing had nothing to do with federal law.

The City's appeal itself was also fact-based, as shown by the excerpts provided at Petitioner's Appendix 112-123, which discuss the basis for the City's well-refuted claim that as to Mr. Ali's property, and based on those specific facts, there was neither a regulatory taking nor a physical taking despite the findings and Judgment below.

The salient federal question throughout the *Ali* case was not raised by the City, but by Mr. Ali. Mr. Ali's second cause of action was a claim that his civil rights were violated, and in particular his due process rights, but the cause was decided against Mr. Ali in the trial court.

The Court of Appeal declined to decide the civil rights issue, which *Ali* had cross-appealed, declaring it moot because a reversal of the cause would not bring any different or additional damages to Mr. Ali. The City did not attempt to seek review of the determination of either court as to the civil rights cause of action.

It would seem that another party's federal claim on a different subject would not change the fact that the City of Los Angeles did not pose a real federal question on appeal in California, thus making it impossible for Petitioner to comply with United States Supreme Court Rule 14(1)(g)(i).

III.

PETITIONER MISTAKENLY REFERS TO THE "DEVELOPMENT" PROCESS; THIS CASE IS ABOUT A DEMOLITION PERMIT.

Petitioner's first issue poses a query about "a land use development approval process" (Petition: Frontispiece). Petitioner's first argument concerns delay in the "Development Approval Process" (Petition: 13). Scattered throughout the Brief are references to "development" permits (i.e. Petition: 15, 16, 18). The case has nothing to do with development permits.

The *Ali* case presents facts almost the antithesis of the usual fact pattern in development permit cases. The real property in *Ali*, far from being raw land, was located in one of the oldest parts of the sprawling City of Los Angeles: the MacArthur Park area. There was no environmental or other community challenge.

Mr. Ali's residential hotel was rendered dangerously damaged and structurally unsound after a fire effectively destroyed it in November, 1988. The City of Los Angeles, however, refused to issue a demolition permit until approximately 21 months later, and, in fact, for about a year of that time physically ousted owner Ali and his private security guards and placed City-hired guards on the property to the tune of just under $400,000 in liens, which Mr. Ali had to pay when he finally was able to sell the property after demolition in August 1990. The California courts have found that the City's actions amounted to both a regulatory and a physical temporary taking of Mr. Ali's real property.

The mis-characterization of the subject of the litigation as a "development process" makes a difference. Mr. Ali was not trying to build anything or to make any changes in the zoning of the land or in its use as combined residential and commercial (Mr. Ali's hotel, as does the subsequent strip mall, featured shops on the first floor). Ali was only attempting to demolish his burnt-out building so he could sell the vacant land.

In the typical development permit case, undeveloped, often scenic or historical real property happens to be located in the path of urban growth and is coveted for new housing or other building by some group while another group opposes any change in the use of the land. The considerations as to which factors would make it reasonable to withhold a development permit are not the same as the considerations as to whether a permit should issue to remove a dangerous, worthless hulk which threatens the public safety and welfare in an area that has been city neighborhood for a century.

At the time Ali submitted his first application, January 1989, the statutory and case law was clear and unambiguous on this subject. Ali had a right to demolish his building under the state Ellis Act which preempted local laws to the contrary. The City, without any legally plausible reason, prohibited him from demolishing his building. The City should not now confuse Ali's clear entitlement to demolition with a developer's campaign to change the character of the land.

The City's long refusal to permit demolition purportedly was based on Mr. Ali's refusal to promise to replace his fire-damaged building with low-income housing pursuant to the city's SRO Ordinance, which never applied to the property

in the first place, as shown by the City's own records. To this day, the City has not offered any "plausible" legal theory justifying its position in denying Ali his demolition.

IV.

THE PRIOR LAWSUIT BETWEEN THE PARTIES IS NOT RELEVANT.

In support of its Petition for Certiorari, the City of Los Angeles, by inclusion, asserts that a prior Los Angeles Superior Court lawsuit between the parties, which was dismissed without prejudice in September 1989, and not even part of the Record on Appeal in California, somehow has bearing on whether the United States Supreme Court hears the case (Petition: 5-7). A copy of the Order of Dismissal is located in Petitioner's Appendix at 48-49.

In its Exhibit K to Petitioner's Appendix, the City's Petition for Rehearing by the California Court of Appeal, the City, as it did below, also attaches copies of the Complaint and a Demurrer from that 1989 non-appealed and long-final lawsuit. The documents were not otherwise part of the record on appeal and were improperly asserted in a California appeal (*Pulver v. Avco Financial Services*, 182 Cal.App.3d 622, 632, 227 Cal.Rptr. 491 (1986); *Sequoia Pine Mills, Inc. v. Superior Court*, 258 Cal.App.2d 65, 69, 65 Cal.Rptr. 353 (1968); *Weller v. Shavarria*, 233 Cal.App.2d 234, 246, 43 Cal.Rptr. 364 (1965)).

This prior lawsuit, which the City calls "Ali I," resulted in an order by the Honorable John Zebrowski sustaining the City's demurrer based on the failure to exhaust administrative remedies before filing suit (Petitioner's Appendix 48-49).

The Order, signed March 20, 1990, is specifically without prejudice to Ali filing a new lawsuit and states in part:

> This Order is not intended to preclude Ali from filing a complaint in a subsequent lawsuit.

The recent appellate decision for which Certiorari is sought arises out of the second lawsuit filed against the City by Mr. Ali that was suggested by Judge Zebrowski, and is not dependent in any way upon the action dismissed nearly half a year before the second lawsuit was commenced in August 1990. The only relevance of that 1989 lawsuit to the case now before this Court was to prove that Mr. Ali raised the Ellis Act against the City early in his negotiations with the City, and neither misled the City nor sat on his rights.

At page 7 of the Petition for Certiorari, the City of Los Angeles states that "[t]he trial judge . . . ruled that Ali was required to continue with the development approval process and obtain a final decision on his permit application." The statement is untrue. As shown by the copy of the ruling at Petitioners' Appendix 48-49, the Judge made no such ruling. In addition, Judge Zebrowski, a well-respected jurist in the Los Angeles area who shortly thereafter moved on to the Court of Appeal, would not have made the mistake of referring to the demolition permit sought by Mr. Ali as part of the "development approval process."

V.

ALI DID NOT CHALLENGE THE VALIDITY OF THE CITY'S SRO ORDINANCE; ALI ALLEGED AND PROVED THAT THE APPLICATION OF ANY LOCAL LAW THAT CONFLICTED WITH THE ELLIS ACT WOULD VIOLATE HIS RIGHTS.

At page 14 of its Brief, Petitioner mischaracterizes the gravamen of the instant lawsuit. Mr. Ali did not argue at trial or on appeal against the SRO ordinance itself, its validity, or its constitutionality. Ali claimed from the beginning of his problems that it was the City's application of the non-applicable SRO ordinance in a manner that interfered with his ability to demolish his shell of a building and go out of the residential rental business that violated the Ellis Act. Any other local provision that hindered or interfered with Mr. Ali's decision to go out of business would be as much a violation of Mr. Ali's Ellis rights.

Had the SRO ordinance actually been applicable to the Ali property, the result would have been the same. The ordinance still would have been preempted by the Ellis Act as to that property and Mr. Ali's rights still would have been violated by its application. The fact that the Ali property never fit the definition of an SRO building, however, makes the City's actions in trying to subject Mr. Ali to the SRO ordinance all the more egregious.

Thus the City's discussion on page 14 to the effect that Mr. Ali's failure to follow the SRO procedures mandated by the City were the origin of his difficulties is not accurate. In fact, Mr. Ali tried to follow the obscure procedures developed in connection with the SRO designation, to no avail.

The City fails to mention that among its other ploys, it specifically and wrongfully classified as "repairable" a totally burned-out building on which an insurance company paid policy limits. The mis-classification avoided any possibility that Mr. Ali could obtain a demolition permit due to the moratorium of such permits mandated by the SRO ordinance, in a local version of "Catch-22." The wrongful label "SRO" delayed the demolition for 21 months.

VI.

THE ISSUES ARTICULATED BY THE CITY DO NOT REFLECT THE FACTS OF THE CASE.

Both questions stated by Petitioner as needing further review are misleading in that they do not accurately reflect the facts of the case. The first implies that Mr. Ali failed to exhaust administrative remedies in seeking "development approval," or that the "development approval process" violates federal law, and the other suggests that the Court of Appeal decision is based on violation of state law by a local ordinance. Both are factually incorrect.

A review of the unpublished 1995 Court of Appeal decision shows that the exhaustion issue was decided in the first appeal (Petitioner's App. 42). The determination that Ali sufficiently exhausted administrative remedies is subject to the Law of the Case Doctrine, and cannot again be challenged by the City of Los Angeles.

There was no "development approval process" in *Ali*, but applications for a demolition permit. Ali did not attack the validity of any administrative process, except as it specifically had been applied to him by the City in

circumstances where he had separate entitlements as a result of the Ellis Act. Likewise, Ali did not attack the validity of any local ordinance, but only the wrongful application of an ordinance to his property.

In addition, the state-law violation by the City did not occur in a vacuum. Mr. Ali was out of pocket over $1,000.000 due to the City's actions. The injury to Mr. Ali was so certain that at trial the City stipulated to the amount of damages in almost the full amount asked for.

It also is the Law of the Case herein that the City had no right to deny Mr. Ali's demolition permit, pursuant to his rights under the Ellis Act (Government Code § 7060 *et al.*; Petitioner's App. 35-47). The City cannot turn back the clock five years to appeal a factual finding that has been final throughout the interim.

VII.

THE SRO CLASSIFICATION WAS NEVER BASED ON SUBSTANCE.

"SRO" stands for "Single-room occupancy" and has different meanings under different regulatory schemes. In the City of Los Angeles, "SRO" essentially means that at least 30% of the rooms have no separate bathroom facilities. Mr. Ali's Ferraro Hotel had a private bathroom for nearly every room and, at least after Mr. Ali's early 1980s remodel, was never an "SRO."

Petitioner's Brief assumes that the SRO designation was properly handled (Petition: 13-14). Petitioner even sets out how the classification was made by employee Paul Wong. The City fails to mention, however, that the *Ali* SRO

designation was the only one ever made by Paul Wong, as he testified at trial. The truth is that the City of Los Angeles had no particular procedure for classification of buildings as SROs.

Many of Mr. Ali's own records were lost in the fire that destroyed the Ferraro, but the City of Los Angeles had all necessary paperwork in its files at all times. When the City eventually determined that Mr. Ali's building was not an SRO, the change of heart was based on a reconstructed file obtained from the City's own records. The City, and only the City, was in a position to clear up any matter regarding the property at any and all times during the last twelve years. The City, however, placed the entire burden of proof on Mr. Ali to show that his building was *not an SRO*!

The transcripts of the final administrative hearing reveal the City's stated basis for the SRO designation on the Ali property: (1) Paul Wong had a conversation with an unidentified man who he believed to be Mr. Ali (but who was not Mr. Ali) and based on that conversation, affixed the label "SRO;" Mr. Wong had been in contact with Councilwoman Gloria Molina's office and made the classification only after consultation; (2) the Rent Stabilization Board, which administered the SRO ordinance, supposedly placed the Ali building on its SRO list, but the City never was able to produce any SRO list which included the Ferraro; (3) an inspection team, nearly a year after the fire and after the building had been ravaged by vandals, stood in the outside doorway of the burned-out hotel and estimated the number of bathrooms in the several-story structure; and (4) Councilwoman Gloria Molina said it was an SRO in a special ordinance she proposed and which was adopted on August 8, 1989 (Joint Appendix on Appeal: II: 472-3, III: 707-8, 731-2, IV: 904-8, 1073, 1086, 1092-5).

The only investigation of its files made on behalf of the City of Los Angeles was more than a year later, after Rent Stabilization Administrator Barbara Zeidman attended one of the Ali administrative hearings and was convinced by Mr. Ali's reconstructed paperwork to check into the facts for the first time (Joint Appendix III: 713-7). It was the first time that any City official listened to Mr. Ali's frequent protests that the building was not an SRO.

VIII.

JUDGE CRISPO'S OBSERVATIONS ON SUBSTANTIVE DUE PROCESS DO NOT APPLY TO INVERSE CONDEMNATION.

At Page 10 of the Petition, the City quotes the Honorable Lawrence W. Crispo, the trial judge, but the context in which the statement was made is not shown. The quote does not apply to the inverse condemnation cause of action.

The trial of this case after the first Appeal was in several parts. The writ cause was heard first by Judge O'Brien and the other causes were heard by Judge Crispo in two phases: Inverse Condemnation (in which Ali prevailed) and Substantive Due Process (Judgment for the City). This trial resulted in three statements of decision which combine to form the findings upon which the Judgment stands.

The portion of Judge Crispo's findings that the City quotes relates to Ali's cause of action under 42 U.S.C. § 1983 for violation of civil rights, specifically Substantive Due Process rights. In the complete version of the chronologically third portion of the findings (Petitioner's App. 22-26), the language quoted by the City is followed

directly in the same paragraph by, "Consequently there was no violation of Mr. Ali's substantive due process rights" (Petitioner's App. 25).

The test for establishing a section 1983 violation is set out by Judge Crispo in the paragraph immediately above the quoted language, and further qualifies the quote. The quote is entirely misrepresented in the Petition (Page 10) as general "findings about the character of the City's actions," when all it really does is show why Judge Crispo felt that the actions of the specific city officials did not "shock the conscience" as is required in California to prevail in § 1983 lawsuits based on substantive due process.

The Section 1983 cause of action was tried after the Inverse Condemnation cause, resulting in a statement of decision on May 1, 1997 (J.A. XIV:3896). Nearly a month before, on April 9, 1997, Judge Crispo's first statement of decision was entered (Petitioner's App. 27-32). In a very different tone than that cited by Appellant City, the Judge stated:

> The Court independently finds, as was found by the Court of Appeal, that the delay in the issuance of the demolition permit was not caused by Ali's conduct and that the City was responsible for all of the delay. The Court also finds that Ali acted properly in his attempts to obtain the demolition permit.

Judge Crispo thus had different things to say about different causes of action. The findings as to Substantive Due Process do not apply to Inverse Condemnation any more than the Inverse Condemnation findings apply to Ali's Civil Rights cause.

The City therefore errs in its argument that Judge Crispo's finding of good faith on the part of city officials sufficient to defeat Ali's claim of civil rights violation also operates to affect his inverse condemnation claims. The several courts which have found the City's purposes illegal have made the objective analysis required for a finding of inverse condemnation.

CONCLUSION

For all the reasons set out above, Respondent Ali asks that this Court deny the City of Los Angeles' Petition for Certiorari.

Respectfully submitted,

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